NO. 88-363

Supreme Court, U.S.
FILED
AUG 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL FOURNIER AND BARBARA FOURNIER, HIS WIFE

Petitioner,

VERSUS

PETROLEUM HELICOPTERS, INC., ET AL

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Are a trial court's findings and conclusions clearly erroneous and a circuit court panel's affirmance and denial of en banc review contrary to established law in failing to award any damages for personal injuries to a severely traumatized helicopter passenger who nearly drowned and suffered uncontradicted, extensive, permanent and total psychiatric disability which rendered him totally non-functional (including (1) post traumatic extreme and chronic depression (dysthymic disorder); (2) post traumatic intense and chronic anxiety; (3) post traumatic chronic pain syndrome; (4) post traumatic phobia of flying and of helicopters and helicopter sound) as well as physical injury due to the helicopter emergency crashlanding from 800 feet in the air into the rough waters of the Gulf of Mexico many miles offshore, where the victim passenger spent nearly two hours in extremely rough, life threatening seas, struggling to stay afloat and ingesting choking amounts of seawater and where there is uncontradicted expert medical testimony of the severe psychiatric disability sustained?

2. Does the United States Court of Appeals for the Fifth Circuit exceed its rulemaking authority under Federal Rule of Appellate Procedure Rule 47 and violate Federal Rules of Appellate Procedure Rule 35 (a) by imposition of the Fifth Circuit's Internal Operating Procedure which sets forth a narrower entitlement to Rehearing En Banc than is authorized by FRAP 35 (a)(2)?

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LISTING OF PARTIES

DANIEL FOURNIER AND BARBARA FOURNIER, HIS WIFE;

PETROLEUM HELICOPTERS, INC.;

SUNSTRAND CORPORATION;

AIRWORK CORPORATION;

GENERAL MOTORS CORPORATION, individually and d/b/a DETROIT DIESEL ALLISON;

THE TRAVELERS INSURANCE COMPANY

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OPINIONS BELOW

Neither the original opinion of the Court of Appeals (Appendix A) nor the opinion of the Court of Appeals denying rehearing and denying rehearing en banc (Appendix B), nor the opinion of the District Court (Appendix C) are reported.

JURISDICTION

Judgment of the Court of Appeals was entered on April 18, 1988. A timely petition for rehearing or for rehearing en banc was denied on May 18, 1988. The jurisdiction of this court is invoked under 28 USC Section 1254 (1).

RULES INVOLVED

Federal Rules of Appellate Procedure 35 (a) reads as follows:

> "A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance."

The Fifth Circuit's Internal Operating Procedure-Suggestion for Rehearing En Banc reads in pertinent part as follows:

> "A suggestion for rehearing en banc is an extraordinary procedure which is intended to bring to the attention of the entire Court a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court of Fifth Circuit precedent. *Alleged errors in the determination of state law, or in the facts of the case (including sufficiency of the evidence), or error asserted in the misapplication of correct precedent to the facts of the case, are matters for panel rehearing but not for rehearing en banc.*" (Emphasis added)

STATEMENT

On October 23, 1981, plaintiff Daniel Fournier was a passenger in a Petroleum Helicopters, Inc. (PHI) helicopter which experienced engine failure 800 feet in the air and proceeded to crashland, making an emergency landing without

power into high seas (8-10 foot seas) in the Gulf of Mexico, many miles offshore from the state of Louisiana. Sitting in the front passenger seat next to the pilot, Mr. Fournier heard the engine stop and saw the red light flashing "engine out". Aware of the dire emergency, Mr. Fournier feared the loss of his life and went into a state of psychiatric shock as the helicopter descended without power in the emergency crashlanding.

Within a half-hour of the emergency crashlanding, both the pilot and Mr. Fournier were seasick. They were pale and worried. The weather was extremely rough and life-threatening. Mr. Fournier was extremely nervous, shaken-up and in shock.

The pilot told Mr. Fournier that the pontoons on the helicopter were only expected to last an hour to an hour and one-half in normal weather and that he did not know how long they could last in rough seas.

After remaining in the helicpoter, being buffeted in the seas, for several hours, Mr. Fournier had to leave the helicopter when a rescue vessel finally arrived.

At the moment Mr. Fournier exited the helicopter, a large wave struck the helicopter on the pilot side to the front, causing Mr. Fournier to be thrown into the Gulf of Mexico before he was able to inflate both sides of his life vest. Only one side of the vest was inflated.

The only partially inflated vest, the extremely rough high seas, and his heavy, water logged clothing caused Mr. Fournier severe problems with staying afloat. He constantly went under, swallowing more and more sea water with every wave.

Mr. Fournier spent almost 30 minutes physically immersed in the water, nearly drowning in the Gulf of Mexico. With every wave, his body would sink, his head would go under water and he would struggle back to the surface to try to breathe, only to be covered by water again, and only to sink again.

He was drowning and he knew it.

After immense struggle, Mr. Fournier finally grabbed desperately onto the tail fin of the helicopter and was raised up and down in the rough seas. Coughing and gasping, he fought to hold on, struggling to inflate his life vest. He clasped the tail wings with both arms summoning the little strength he had left, struggling to unchoke himself from the massive quantity of sea water he had swallowed and hanging on until he started to regain his senses to the point where he at least could motion to the rescue vessel to attempt to throw him a life ring.

After severe difficulty, he finally reached the life ring and was pulled on board a rescue vessel where the vessel crew wrapped him in a blanket, nauseated and shaking. His next memory was opening his eyes, lying on the deck of the boat in vomit.

There was uncontradicted expert psychiatric testimony that this severe life-threatening experience produced a state of severe psychiatric disability. Mr. Fournier is now completely disabled psychiatrically from engaging in normal functions of life. In addition to the severe panic state into which he was placed, Mr. Fournier suffers post traumatic extreme and chronic depression (dysthymic disorder), post traumatic intense and chronic anxiety, post traumatic chronic pain syndrome, and post traumatic phobia of flying and of helicopters and of helicopter sounds.

He has also suffered pseudodementia and suicidal thoughts. His previously happy married life has been ruined and he spends virtually all of his time withdrawn in his bedroom. Before this severe psychiatric trauma, Mr. Fournier was a very active, responsible man who had worked continuously for 25 years in the offshore oil field. He had achieved a highly responsible position as an offshore production foreman and was energetic, industrious and productive. His life style was completely destroyed by this debilitating trauma and he has become a virtual recluse.

Mr. Fournier's suit was filed initially against the helicopter owner and operator, Petroleum Helicopters, Inc., which filed third-party complaints against the manufacturer of the helicopter engine which failed (General Motors Corporation/Detroit Diesel Allison), the manufacturer of the fuel pump which failed (Sundstrand Corporation), and the overhaul facility which last overhauled the fuel pump before its failure (Airwork Corporation).

Because the parties could not agree on an evaluation of the case (plaintiff's evaluation was at least $1,000,000.00 and defendants never offered more than $500,000.00), and because the damages trial was anticipated to last only about one week whereas the liability trial would last approximately three weeks or more, the case was tried on damages first, with the expectation that the evaluation on damages placed by the trial court would assist in settling the case.

Instead, the trial court awarded no damages at all and dismissed the plaintiff's case, totally ignoring the severe psychiatric injury and the uncontradicted and extensive evidence of that injury.

The Appeals Court panel did not correct this severe injustice, and the Fifth Circuit has in effect an Internal

Operating Procedure which restricts the availability of en banc review by the Fifth Circuit to a smaller class of cases than FRAP 35 (a) allows. Rehearing En Banc was denied under the Fifth Circuit's restrictive standard.

Accordingly, Writ of Certiorari was necessitated.

The Federal District Court entertained this case on admiralty jurisdiction.

REASONS FOR GRANTING THE PETITION

A. VIOLATION OF SUPREME COURT STANDARD BY FIFTH CIRCUIT AND TRIAL COURT

There is uncontradicted medical evidence of the severe psychiatric injuries suffered by Mr. Fournier as a result of the ordeal to which he was subjected. He is entitled to an award of damages for this mental injury under long settled law. The decision by the trial court, upheld by the Fifth Circuit panel, conflicts with the applicable decisions of the circuit courts, including the Fifth Circuit itself, and of the United States Supreme Court which require an award of damages when a person suffers severe psychiatric injury. *Sahuc v. U.S. Fidelity & Guaranty Co.*, 320 F.2d 18 (5th Cir. 1963); *Haley v. Pan American World Airways, Inc.*, 746 F.2d 311, rehearing denied 751 F.2d 1258 (5th Cir. 1984); *Henry v. Gross*, 803 F.2d 757 (2nd Cir. 1986); *Shaw v. U.S.*, 741 F.2d 1202 (9th Cir. 1984); *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 107 S.Ct. 1410, 1417-1418 (1987), on remand 818 F.2d 868; *Hamilton v. Canal Barge Co., Inc.*, 395 F.Supp. 978 (E.D. La. 1978). Definite nervous disorders which can be shown to be the result of immersions in the sea are compensable conditions. *Petition of U.S.*, 418 F.2d 264 (1st Cir. 1969).

The trial court ignored the psychiatric injury and the Fifth Circuit panel failed to review the entire evidence to assess whether the trial court's findings were clearly erroneous.

The appellate court decision violated the Supreme Court's clearly erroneous standard as articulated in *McAllister v. United States*, 348 U.S. 19, 20, 75 S.Ct. 6, 8, 99 L.Ed. 20 (1954) which states:

> "A finding is clearly erroneus when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *United States v. Oregon State Medical Socity*, 343 U.S. 326, 329, 72 S.Ct. 690, 698, 96 L.Ed. 978; *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746.

This case arises out of serious injuries, particularly serious psychiatric injuries, sustained by Daniel Fournier when a helicopter in which he was a passenger emergency crashlanded from an altitude of 800 feet into eight to ten foot seas in the Gulf of Mexico, where it remained for a two hour period. Mr. Fournier remained on board the helicopter as it rode the rough seas. When a rescue vessel arrived, Mr. Fournier left the helicopter and was standing on its pontoon awaiting a rescue ring from the vessel. Before he could inflate his life vest, a large wave caused him to be thrown into the Gulf of Mexico. Uncontradicted evidence shows that Mr. Fournier nearly drowned while he struggled to stay afloat in the rough seas for a period of approximately thirty minutes. This traumatic, life threatening experience has produced severe psychiatric injury and disability.

The Trial Court, considering only physical injury to neck and back, completely *ignored* this psychiatric damage, on which the proof is massive and uncontradicted. The summary calendar appeals court decision ignores the fact that the trial court erred in never addressing the psychiatric trauma. Further, the summary panel opinion repeats the same error and further completely misunderstands the psychiatric testimony. The summary calendar opinion addresses the psychiatric trauma in one short sentence only. That sentence reads (at page 6 thereof) as follows:

> "At trial, Dr. Sanders, Fournier's psychiatrist, acknowledged that Fournier's psychic injuries resulted from the surgical operations and the pain caused by these proceedings."

Dr. Oliver Sanders submitted an affidavit to the Fifth Circuit specifically indicating the clear and utter error of the summary calendar panel opinion. Dr. Sanders's affidavit reads:

"I have read your opinion which asserts that:

> "At trial, Dr. Sanders, Fournier's psychiatrist, acknowledged that Fournier's psychic injuries resulted from the surgical operations and the pain caused by these procedures."

I have never held this opinion and your attribution of that opinion to me is an outright error.

Mr. Fournier has serious psychiatric injuries and disabilities due to the helicopter crashlanding and the period he spent in the water. These psychiatric injuries are not dependent on nor are they due to the physical injuries he sustained, nor to the surgical operations and pain caused by these procedures."

The summary calendar decision also ignores Dr. Crenshaw's uncontradicted testimony that Mr. Fournier suffered from anxiety neurosis due to the helicopter crashlanding.

Like the erroneous trial court decision, the Fifth Circuit's opinion ignores Dr. Thomas Haydel's uncontradicted findings that Mr. Fournier suffered tachycardia as a result of the crashlanding episode and ignores that Dr. Crenshaw, likewise, diagnosed the tachycardia. The Fifth Circuit opinion, likewise, ignores orthopedist Dr. Gary's uncontradicted findings of myalgia due to the helicopter incident.

The Fifth Circuit opinion is also clearly wrong in not holding that the Trial Court erred in failing to make an award to Mr. Fournier for what the Trial Court found to be "muscular strain". (The Trial Court specifically states: "While Mr. Fournier may have been experiencing some degree of pain, the evidence established that this was most likely due to muscular strain.")

The Trial Court and Appeals Court decisions totally ignore the psychic shock and anxiety experienced when the engine failed at 800 feet up in the air. No award was made for seasickness or nausea experienced by Mr. Fournier, which the Trial Court and Appeals Court totally ignored. The Trial Court and Appeals Court totally ignored the bruising experienced by Mr. Fournier's arms, which resulted from his struggling to hold on to the tail fin of the helicopter while he remained in the Gulf of Mexico for thirty minutes in the water being battered by the rough seas and the helicopter.

The Fifth Circuit's opinion nowhere addresses the above issues. It also contains numerous factual omissions which imply that the preparation of the summary calendar

opinion did not involve a careful review of the entire trial record. Curiously, the omissions of fact in the summary calendar opinion are virtually identical to the omissions of fact in the briefs filed by Petroleum Helicopters, Inc. and Sundstrand Corporation. The summary calendar opinion totally ignores the testimony of three uncontradicted fact witnesses and several treating physicians, as well as failing to address the specific testimony of fellow passenger Kerman LeBlanc who witnessed Mr. Fournier nearly drown.

Further clear evidence of the Trial Court's error, and the summary panel opinion's lack of attention to the facts, is the failure of the trial court to award any damages for property loss, even though it is undisputed that Mr. Fournier experienced loss of his personal possessions (travel bag and various contents) as well as loss of his pair of eye glasses. This simply exemplifies the lax attitude toward the evidence in this case by the Trial Court.

Because an en banc correction of this injustice was denied in the Fifth Circuit, the Supreme Court is entreated to do justice for Mr. Fournier.

B. IMPROPER RESTRICTION OF EN BANC REVIEW IN FIFTH CIRCUIT

The United States Court of Appeals for the Fifth Circuit is not entitled under Federal Rules of Appellate Procedure (FRAP) 47 to issue a local rule or operating procedure inconsistent with FRAP 35 (a), which authorizes a rehearing en banc under circumstances "when the proceeding involves a question of exceptional importance" under FRAP 35 (a)(2). However, the Fifth Circuit's Internal Operating Procedure seeks to prohibit en banc review of "alleged errors in...the facts of the case (including sufficiency of the evidence), or error asserted in misapplication of correct precedent to the facts of the case...", restricting

such applications to panel rehearing. FRAP 35 (a)(2) contains no such restriction. The Sixth Circuit in its IOP 18.6 and Eighth Circuit Rule 16 (c) and Eleventh Circuit Rule 35.3 appear to share the Fifth Circuit's restrictive approach to en banc review, which appears inconsistent with FRAP 35 (a)(2) and violative of FRAP 47.

Under the Fifth Circuit's procedure, a petitioner is forced to apply to the United States Supreme Court even though "the proceeding involves a question of exceptional importance" under FRAP 35 (a) if the appellate panel fails to correct an injustice which has occurred within the Fifth Circuit. Such has occurred in the *Fournier* case. If instead, the Fifth Circuit is required to entertain an en banc review of those injustices authorized by FRAP 35 (a)(2), then the appellate court's en banc review can correct the injustice without the need of burdening the United States Supreme Court.

CONCLUSION

For all of the foregoing reasons, the Petition for Certiorari should be granted.

Dated August 12, 1988.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 12th day of August, 1988, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3376
Summary Calendar

DANIEL FOURNIER AND BARBARA FOURNIER, his wife and individually,

Plaintiffs-Appellants,

THE TRAVELERS INSURANCE CO.,

Intervenor-Appellant,

versus

PETROLEUM HELICOPTERS, INC., Individually and d/b/a P. H. I. HELICOPTERS, ET AL.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana
(CA-82-2547-I(4))

(April 18, 1988)

Before REAVLEY, KING, and JOLLY, Circuit Judges.

REAVLEY, Circuit Judge:*

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Daniel and Barbara Fournier brought this admiralty action against Petroleum Helicopters, Inc. (PHI) seeking damages allegedly incurred when a PHI helicopter in which Mr. Fournier was traveling made an emergency landing in the Gulf of Mexico. Following a bench trial on damages, the district court held that plaintiffs failed to establish that the emergency landing was the cause of plaintiff's injuries and entered judgment for PHI. We affirm.

I.

On June 17, 1982 plaintiffs filed this suit against PHI seeking damages for injuries allegedly sustained by Mr. Fournier on October 23, 1981 during an emergency helicopter landing in the Gulf of Mexico. PHI, the owner and operator of the helicopter, instituted third-party claims against Sundstrand Corporation, the manufacturer of the fuel pump installed in the helicopter; Airwork Corporation, the overhauler of the fuel pump; and Allison Gas Turbine Operations, the manufacturer of the helicopter engine. Travelers Insurance Company intervened as the workers' compensation insurer of Mr. Fournier's employer, Operator's, Inc. (Tenneco).

By agreement of the parties, the trial was bifurcated and tried on the issue of damages first. At the conclusion of the evidence, the court requested that the parties submit post-trial briefs on the issue of causation. Finding that plaintiffs failed to establish that the emergency helicopter landing caused Mr. Fournier's injuries, the court entered judgment in favor of PHI and dismissed the third party complaints and Traveler's complaint of intervention, as well as all cross-claims.

II.

The gravamen of plaintiffs' argument on appeal is

that the district court erroneously found that the helicopter landing and subsequent rescue were not as traumatic as Fournier's testimony indicated and that the incident did not cause Fournier's back, neck and psychic injuries. Plaintiffs also contend that the court was inattentive, partisan and made numerous errors, and that plaintiffs are entitled to a trial by jury. A careful review of the trial record is necessary to resolve these claims.

On October 23, 1981 Fournier and Kerman LeBlanc boarded a helicopter, piloted by Harold Elis Blinsky, which was to take them to an offshore drilling platform upon which Fournier worked. After encountering severe weather, the helicopter's engine failed and the pilot made an emergency landing in the Gulf of Mexico. Although Fournier characterized the landing as a "crash," LeBlanc and Blinsky testified that there was no traumatic impact upon landing and that the aircraft was not damaged. It took two hours for a rescue boat to arrive, during which time the helicopter floated upon its inflated pontoons. While neither LeBlanc nor Blinsky described their wait for the rescue boat as traumatic, Fournier testified that he was tossed about and hit the other passengers.

The rescue required Fournier, LeBlanc and Blinsky to enter the water. Fournier testified that he nearly drowned, that he swallowed large amounts of water and choked, and that he was repeatedly struck in the back by the helicopter's pontoons. Despite these events, Fournier told Blinsky on the rescue boat that he was not injured. After being transported to Abbeville General Hospital, he also told Dr. Kennedy, an emergency room physician, that he sustained no injuries. Dr. Kennedy released Fournier with a diagnosis of "no injuries." Neither Blinsky nor LeBlanc sustained any injuries.

Fournier returned to work on October 27, 1981 less than one week after the emergency landing. He continued working through December 11, 1981, making no complaints of pain to anyone, including his wife. Despite Fournier's testimony that he was experiencing back and neck pain during this period, his supervisors, Norris Soileau and Merlin Prosper, testified that Fournier never indicated that he was unable to perform his work or that he was having any trouble with his back or neck.

On December 15, 1981 Fourneir sought medical treatment from Dr. Crenshaw. Despite Fournier's claims to the contrary, Dr. Crenshaw testified that he did not recall Fournier complaining of any back, neck or other orthopedic pain during either his initial visit or his follow-up visit on December 23, 1981. Instead, Fournier was examined for chest pains. An electro-cardiogram (EKG) was taken, which proved normal. On January 6, 1982, more than nine weeks after the emergency landing, Fournier returned to Dr. Crenshaw complaining of back pain. After performing an orthopedic examination, Dr. Crenshaw found Fournier's back to be normal. On January 11, 1982 Fournier sought treatment from Dr. Gary, an orthopedic surgeon. Dr. Gary found Fournier's back to be normal and diagnosed only muscle pain. On January 18, Dr. Gary reviewed X-rays taken by Dr. Crenshaw and found only minimal degeneration compatible with a man of Fournier's age.

Fournier then contacted his attorney, who arranged for him to see Dr. Watermeier on January 27, 1982. Following this evaluation, Dr. Watermeier concluded that Fournier had simply aggravated a pre-existing arthritic condition. On February 1 Dr. Watermeier took a myelogram of Fournier's back which revealed a ventral indentation (a bump) on one of his lower vertebra. On February 19, 1982 Dr. Watermeier performed elective surgery on Fournier's

lower back. The surgery revealed a bulging, not a herniated or ruptured, disc. Dr. Watermeier testified that he would expect to find such a bulging disc in 60% to 70% of men in Fournier's general age group and occupation.

While Fournier had complained of neck pain during his first visit to Dr. Watermeier on January 27, 1982, Fournier did not again complain of neck pain to Dr. Watermeier until August 30, 1982. Neither Dr. Watermeier's first nor second examination of Fournier's neck revealed objective problems. In January 1983, after further complaints by Fournier, Dr. Watermeier ordered a cervical discogram which revealed a bulging, not a herniated or ruptured, disc. Dr. Watermeier testified that approximately 60% to 70% of the men in plaintiff's age and occupational category have a bulging disc of this nature. Dr. Watermeier conducted corrective surgery on Fourneir's neck. Thereafter, Fournier underwent six further operations on his back and neck. At trial, Dr. Sanders, Fournier's psychiatrist, acknowledged that Fournier's psychic injuries resulted from the surgical operations and the pain caused by these procedures.

III.

The district court found that "[t]he helicopter landing, while more than normally experienced, was not a 'crash,' nor was the plaintiff subjected to conditions which could be deemed extraordinary in nature." In addition, the court found that "[t]he plaintiff did not exhibit any objective clinical symptoms indicative of a back or neck injury in the several months following the incident. While Mr. Fournier may have been experiencing some degree of pain, the evidence established that this was most likely due to muscular strain." From these findings, the court concluded that Fournier failed to establish causation, stating that

there are *several* plausible explanations for the

> current debilitated state of the plaintiff. . . . Had the plaintiff evidenced back or neck injury symptomatology in the days following the incident, the Court might have been inclined to find causation. However, the earliest credible complaint of such was February 6, 1982, more than two months after the incident. (emphasis in original)

We review the district court's findings of fact under the "clearly erroneous" standard. Fed. R. Civ. P. 52(a). Plaintiffs contend that the court improperly found that the emergency landing was not a crash and that Fourneir was not subjected to a particular traumatic experience. The court's findings, however, are supported by the testimony of Blinsky and LeBlanc and by Fournier's own admission to Blinsky and Dr. Kennedy that he was not injured. Plaintiffs also contend that the court's finding that Fournier did not complain to Dr. Crenshaw of back pain until January 6, 1982 was erroneous and that, in fact, Fournier made this complaint during the December 23, 1981 appointment with Dr. Crenshaw. This assertion is simply not supported by the record. We find ample evidence in the record to support the court's factual findings and its conclusion that plaintiffs failed to establish causation, and therefore hold that plaintiffs' challenges to these findings is without merit.

In response to plaintiffs' contention that the district court was inattentive and partisan, we find, after reviewing the trial record, that the court was alert and showed no favoritism. We find that plaintiffs' laundry list of alleged misconduct by the district court is without foundation or merit. Plaintiffs also contend that they were entitled to a trial by jury. However, Rule 38(e) of the Federal Rules of Civil Procedure denies the right to trial by jury under any claim cognizable only in admiralty. Jurisdiction in this case is based on the General Maritime Law, and plaintiffs do not argue that an alternative basis for jurisdiction exists. Therefore, plaintiffs were not entitled to a jury trial.

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3376
Summary Calendar

Filed May 1 1988

DANIEL FOURNIER and BARBARA FOURNIER, his wife and individually,

Plaintiffs-Appellants,

THE TRAVELERS INSURANCE CO.,

Intervenor-Appellant,

versus

PETROLEUM HELICOPTERS, INC., Individually and d/b/a P. H. I. HELICOPTERS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana
(CA-82-2547-I(4))

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion APRIL 18, 1988, 5 Cir., 198__, _____F.2d_____)
(MAY 18, 1988)

Before REAVLEY, KING, and JOLLY, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is Denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

CLERKS NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed APRIL 15, 1987

DANIEL FOURNIER, ET AL. CIVIL ACTION

VERSUS NUMBER: 82-2547

PETROLEUM HELICOPTERS, INC., ETC., ET AL. SECTION: "I"

CONSOLIDATED WITH:

PETROLEUM HELICOPTERS, INC. CIVIL ACTION

VERSUS NUMBER: 82-4733

SUNDSTRAND CORPORATION, ET AL. SECTION: "I"

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MENTZ, District Judge

MEMORANDUM OPINION

JURISDICTION

Jurisdiction is established under 28 U.S.C. §1332.

BACKGROUND

By agreement, trial was held on the issue of damages only beginning on January 20, 1987, and after submission, the Court requested briefing solely on the question of causation.

Plaintiff was allegedly injured on or about October 23, 1981, when he was a passenger in a helicopter owned and operated by Petroleum Helicopters, Inc. En route to an oil rig in the Gulf of Mexico, the helicopter encountered bad weather and experienced engine trouble. As a result of engine failure, the pilot put the helicopter into "auto-rotation[1] at a height of about eight hundred feet, landing on 8-10 foot seas, with 20-30 feet between wave crests. The 35 MPH wind was beneficial to the landing and there was no damage to the helicopter. The experienced pilot testified that there was no real impact but he could, of course, feel the helicopter hit the water. This version of the incident was confirmed, in pertinent part, by Kerman LeBlanc, also a passenger in the helicopter. Plaintiff, however, characterizes the landing as a "crash", and at various times has elaborated on the degree of the event and the subsequent conditions.

It took two hours for a rescue boat to arrive. During this time, the helicopter "rolled" with the waves, and was subjected to winds and high seas. The craft was equipped with inflatable pontoons which kept it afloat, although there was testimony that the pilot was concerned the pontoons would not hold up for an extended period. The pilot and passengers were required to transfer to the rescue vessel by means of a guide rope. This necessitated that they enter the water. Neither the pilot nor the other passenger were injured in this incident.

Plaintiff was taken to the Abbeville General Hospital for a check-up following the rescue and the report states "no pain and didn't get hit anywhere, patient denies injuries," with diagnosis of no injuries by Dr. J. T. Kennedy. (Defendant Ex. 1).

Defendant Exhibit 5 shows that plaintiff went to Dr. Bryan Hemard on October 26, 1981 for an eye exam and to obtain new eyeglasses. Dr. Hemard reported that the plaintiff was not upset about the accident, even though "he said that he was in the water for 24 hours." Plaintiff returned to work until December 11, 1981, and then consulted Dr. Crenshaw.

The plaintiff had continued to work during November and December of 1981. Mr. Fournier successfully performed his duties on the rig during this time. Earl Prosper, Mr. Fournier's supervisor, testified that the plaintiff never complained of any ailments during the seven to eight weeks after the accident. Further, Mr. Prosper did not detect any physicial manifestations of an injury.

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[1] Auto-rotation is the procedure in which a helicopter uses the air current caused by the descent to turn the blades, thus allowing the pilot control of the aircraft.

Dr. Crenshaw, a family physician, first examined plaintiff on December 15, 1981 for "problems in the chest". The doctor ordered an electro-cardiogram (EKG) which proved normal. The doctor testified that the plaintiff demonstrated an "anxiety neurosis" because he felt his job was in jeopardy due to the helicopter crash. Dr. Crenshaw referred plaintiff to an internist for a treadmill test and cardiac evaluation. On January 5, 1982, after receiving Dr. Henry's treadmill test results, the plaintiff alleged for the first time that he had complaints as to his neck and lumbar region. The diagnosis was lumbar-sacral strain.

Plaintiff then consulted Dr. Haydel on January 11, 1982. After a complete physical exam, Dr. Haydel found no symptoms of orthopedic injury. The only positive finding was a fast heart rate and a complaint of chest pain.

However, Dr. Haydel referred plaintiff to Dr. Dexter Gary, a local orthopedic surgeon, who related that plaintiff complained about both hips, both shoulders, his neck and low back. Relative to the neck, there was a complete normal range of motion, no spasm, and a normal exam as to neck and shoulders. The back exam showed a full range of motion, without spasm, and no evidence of radiculopathy. His reflexes were intact and the straight leg raising test negative. His clinical evaluation of the low back was normal. The diagnosis was "mild myalgia" (muscle pain). The doctor noted "it was subsequent to these chest pains and headaches that he began having multiple joint complaints." The doctor did not perceive any significance in the helicopter crash, as the plaintiff was able to continue working for two regular hitches after the accident. On January 18, 1982, plaintiff returned and brought his x-rays of the cervical spine. Dr. Gary felt that they showed minimal degenerative changes compatible with Mr. Fournier's age, with a sacralization at S-1 (genetic-no clinical significance) and a slight narrowing of L-5 disc space.

These symptoms were deemed compatible with plaintiff's age and occupation, and had no significance based on a normal clinical exam. The diagnosis was "no indication of significant trauma to neck or back. No return appointment was given."

At this point, plaintiff's attorney arranged for him to see Dr. Watermeier of New Orleans which he did on January 27, 1982. The diagnosis provided was an "aggravation of arthritis in spine." A return visit on February 1, 1982, for complaints of problems in the low back area, resulted in a myelogram which showed no evidence of problems except for what was noted to be a ventral indentation of L4-L5 vertebra. While the EMG test was normal, the doctor did a nerve block which was positive at L4-L5. In Exhibit Defendant 9, (his deposition), Dr. Watermeier was asked

> "Did you find any objective evidence of some problem in the lumbar area?"
>
> Answer: No objective evidence.

The plaintiff was then admitted to the St. Charles General Hospital on February 14, 1982, and had surgery February 19, 1982.[2] Dr. Watermeier noted, when asked about "looking further," that "the only way you can look further is sometimes with an operation to directly look." (Deposition Page 153).

For reasons never satisfactorily explained to the Court, Dr. Watermeier deemed this surgery appropriate. Over the next several years, the plaintiff was subjected to numerous surgical procedures, to wit:

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[2] Neither insurance company nor employer was advised of the anticipated surgery, the cost of which was guaranteed by Attorney Thalheim.

February 14, 1982[3] - lumbar laminectomy
January 5, 1983 - cervical anterior fusion
May 6, 1983 - lumbar fusion and laminectomy
October 23, 1984 - Morphine epidural
May 19, 1985 - cervical anterior fusion
November 14, 1985 - Morphine epidural
March 10, 1986 - sympathectomy and epidural
September 29, 1986 - Morphine epidural

Dr. Richard Levy, a well recognized expert in neurosurgery, testified at trial and stated that with the date of the accident being October 23, 1981, and eleven and one-half weeks having passed before the advent of symptoms, that the accident was not the cause of plaintiff's spine problems. He further noted that his first complaint of neck pain was on August 30, 1982, some ten months after the helicopter incident. With a disc injury, the symptoms would appear within 48-72 hours, and five days would be the outside limit within the realm of medical probability. Accordingly, the disc injury must have occurred through some other incident, such as a simple twist, a heavy cough, or even picking up a newspaper.

Dr. Levy reviewed the EMG, myelogram, and rediculorgram (nerve block test) of Dr. Watermeier, and stated that a lumbar laminectomy was not indicated. Further he stated that a bulging disc does not cause compression on the nerve.

In light of the foregoing, the following are the Court's findings of fact and conclusions of law. To the extent that any findings of fact are conclusions of law, they are adopted as such; to the extent that any conclusions of law are findings of fact, they are so adopted. For the purposes of this opinion, the only issue to be addressed is the causation of plaintiff's injuries.

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[3] Above dates refer to first day of hospitalization.

FINDINGS OF FACT

I.

Mr. Fournier is presently experiencing a significant degree of pain, which amounts to an almost total disability.

II.

Prior to the helicopter incident on October 23, 1981, the plaintiff was in average health, experiencing only the normal degenerative and arthritic conditions in his back and neck which would be expected for a man of his age and occupation.

III.

The helicopter landing, while more severe than normally experienced, was not a "crash," nor was the plaintiff subjected to conditions which could be deemed extraordinary in nature. A video-tape of a helicopter landing by "auto-rotation" demonstrated the manner in which an "auto-rotation" landing is made.

IV.

The plaintiff did not exhibit any objective clinical symptoms indicative of a back or neck injury in the several months following the incident. While Mr. Fournier may have been experiencing some degree of pain, the evidence established that this was most likely due to muscular strain.

V.

None of the several local doctors examining Mr. Fournier between the time of the incident and the time of

the first surgery detected any objective manifestations which indicate that the plaintiff's back or neck had been injured. These doctors were selected by plaintiff. The only doctor to note any condition out of the ordinary was Dr. Watermeier, who performed the surgery after being selected by plaintiff's attorney. The first examination by Dr. Watermeir found nothing significant, and the second examination revealed, at best, only suspect symptoms.

VI.

Since the time of that initial surgery, the plaintiff's physical and mental condition have seriously deteriorated. None of the surgical procedures appear to have aided Mr. Fournier; on the contrary, he is worse now than before the series of operations. Psychiatric care by Dr. Oliver Sanders has not returned the plaintiff to his pre-surgical mental condition.

CONCLUSIONS OF LAW

I.

To prevail in this matter, the plaintiff must establish, by a preponderance of the evidence, that the defendants' negligence[4] was the legal cause of his injuries.

II.

In a maritime tort case, the Court relies on general principles of negligence law. *Daigle v. Point Landing, Inc.*, 616 F.2d 825 (5th Cir. 1980).

III.

According to W. Page Keeton, Prosser and Keeton

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[4] Since this matter was tried solely on the issue of damages, the Court pretermits a finding of negligence, and assumes for the sake of discussion that the defendants were negligent.

on Torts, 263, 269 (5th Ed. 1984),

> An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered. This connection usually is dealt with by the courts in terms of what is called "proximate cause" or "legal cause."
>
> On the issue of the fact of causation, as on other issues essential to the cause of action for negligence, the plaintiff, in general, has the burden of proof. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the proababilities are at best evenly balanced, it becomes the duty of the Court to direct a verdict for the defendant. (footnote omitted).

This standard mirrors the typical jury charge in a case such as this. Were this a jury case, the Court would have instructed the jury in a manner similar to the following:

> You are not to award damages for any injury or condition from which the plaintiff may have suffered, or may now be suffering, unless it has been established by a preponderance of the evidence in the case that such injury or condition was proximately caused by the accident in question. An injury or damage is proximately caused by an act, or failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or

> actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

Indeed, not only is this standard applicable in a general maritime law case, but would be appropriate in a state law claim for negligence. *See, e.g., Dixie Drive It Yourself System v. American Beverage Co.,* 137 So.2d 298 (La. 1962).

IV.

Thus, the plaintiff bears the burden of proving that the landing of the helicopter on turbulent seas and the resulting period wherein the plaintiff was "riding the waves" in the helicopter while waiting for rescue, and the eventual transfer to the rescue vessel, caused the injuries of which he now complains. This he has not done.

V.

A review of the facts herein indicate that there are *several* plausible explanations for the current debilitated state of the plaintiff. While the Court will not engage in speculation as to exactly which explanation it feels is the most plausible, the Court does not view the helicopter incident as having been such. The plaintiff has failed to establish the crucial link between his back and neck problems and the October 23, 1981 emergency landing.

Had the plaintiff evidenced back or neck injury symptomatology in the days following the incident, the Court might have been inclined to find causation. However, the earliest credible complaint of such was January 6, 1982, more than two months after the incident. Further, the record does not reflect at any time that there were reliable

medical indications that the plaintiff had been injured on October 23, 1981.

VI.

In sum, the record reflects that the plaintiff has failed to carry his burden that his injuries are the result of the helicopter emergency landing. Since the plaintiff has not established the vital link between negligence and damages, whether the defendants, or which among them, were negligent, or the quantum of the plaintiff's damages is irrelevant. Accordingly, judgment will be entered in favor of the defendants, dismissing the claims of the plaintiff with prejudice.

New Orleans, Louisiana, this 8th day of April, 1987.

/s/ Henry S. Mentz, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY
APRIL 30, 1987
MENTZ, J.

Filed MAY 14, 1987

DANIEL FOURNIER, ET AL. CIVIL ACTION

VERSUS NUMBER: 82-2547

PETROLEUM HELICOPTERS, INC., ETC., ET AL. SECTION: "I"

CONSOLIDATED WITH:

PETROLEUM HELICOPTERS, INC. CIVIL ACTION

VERSUS NUMBER: 82-4733

SUNDSTRAND CORPORATION, ET AL. SECTION: "I"

The Court's Memorandum Opinion in this matter, dated April 8, 1987 is hereby AMENDED to correct certain typographical errors, to wit:

(1) jurisdiction is established pursuant to 28 U.S.C. §1333, *not* §1332.

(2) on page 6, "rediculorgram" should be corrected to read "radiculogram".

IT IS ORDERED that the Clerk of Court shall forthwith enter judgment in Civil Action No. 82-2547 in favor of the defendants, dismissing with prejudice the claims of the plaintiff as well as all cross claims.

IT IS FURTHER ORDERED that a status conference will be convened on TUESDAY, MAY 12, 1987 at 1:30 p.m. to discuss the course of Civil Action No. 82-4733, and to select a trial date.

Clerk to serve all counsel

DATE OF ENTRY MAY 6 1987

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed MAY 14, 1987

DANIEL FOURNIER, ET AL. CIVIL ACTION

VERSUS NUMBER: 82-2547

PETROLEUM HELICOPTERS, INC., ETC., ET AL. SECTION: "I"

CONSOLIDATED WITH:

PETROLEUM HELICOPTERS, INC. CIVIL ACTION

VERSUS NUMBER: 82-4733

SUNDSTRAND CORPORATION, ET AL. SECTION: "I"

JUDGMENT

Considering the Court's Memorandum Opinion entered April 15, 1987 and the Minute Entry entered April 30, 1987, accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment and dba P.H.I. Helicopters, and against plaintiffs Daniel Fournier and Barbara Fournier, dismissing said plaintiff's complaint with prejudice and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the third party complaints of defendant, Petroleum Helicopters, against Sundstrand Corporation, DATE OF ENTRY MAY 14 1987

Airwork Corporation and Allison Gas Turbine Operations, a Division of General Motors Corporation, are dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the complaint of intervention of The Travelers Insurance Company is hereby dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the third party complaint of Sundstrand Corporation against Pesco, A Division of Borg Warner Corp. and Borg Warner Corporation is hereby dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any and all cross claims filed in this civil action are hereby dismissed with prejudice.

New Orleans, Louisiana, this 14 day of May, 1987.

/s/ Henry A. Mentz, Jr.
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
SEP 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL FOURNIER AND BARBARA FOURNIER,
Petitioners

v.

PETROLEUM HELICOPTERS, INC., *et al.*,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Petition presents "special and important reasons" within the meaning of Rule 17 of the Supreme Court Rules for this Court to grant review on writ of certiorari, especially where the trial court's dismissal of this maritime personal injury action for petitioners' failure to establish a causal link between an incident and his alleged injuries was not contrary to any established law and the appellate court's affirmance of same was not violative of this Court's clearly erroneous standard.

2. Whether the Internal Operating Procedures of the Fifth Circuit Court of Appeals concerning rehearing en banc set forth a narrower entitlement to such a rehearing than Federal Rule of Appellate Procedure 35(a).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-363

DANIEL FOURNIER AND BARBARA FOURNIER,
Petitioners

v.

PETROLEUM HELICOPTERS, INC., *et al.*,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On October 23, 1981, Daniel Fournier, petitioner herein, was a passenger aboard a helicopter operated by respondent, Petroleum Helicopters, Inc., which made an emergency landing in the Gulf of Mexico after its engine failed. Also aboard the aircraft were the pilot and a second passenger, Kerman LeBlanc. The pilot was alerted to the engine failure by the engine-out light and warning horn, and immediately entered autorotation. As explained at trial, in an autorotational landing the rotor blades are kept in motion by the air travelling upward through the blades as the aircraft descends, and the pilot has equal control over the aircraft as during powered flight. The

aircraft stabilizes when it goes into autorotation; there is no "free fall."

Petitioner has described an incident involving a free fall of a helicopter from an altitude of approximately 800 feet, a violent crash into the sea and a subsequent period of two hours aboard the aircraft during which he was constantly thrown and jerked about. However, Fournier's account differs significantly from the descriptions provided by the other two occupants. Both testified that there was no traumatic impact on landing and recited the details of a successful autorotational landing without injury to persons or damage to the helicopter. The helicopter landed level in the water undamaged, with its pontoons inflated. Even Fournier admitted that he was not aware of any injury to himself after the landing, or while awaiting rescue.

Additionally, neither LeBlanc nor the pilot characterized their wait for the rescue boat as traumatic. In fact, LeBlanc stated that he was relieved when he saw how the pilot had control of the aircraft in the seas. He further stated that he was not bothered by the rocking motion of the aircraft, and the pilot testified that the aircraft rode the seas well, moving with the waves "like a cork."

After approximately two hours, the occupants of the aircraft were taken aboard a rescue boat and transported to a hospital where petitioner was examined and released with a diagnosis of "no injuries."

Three days after the incident the petitioner visited his opthalmologist to secure a new pair of eyeglasses quickly so that he could return to work. The opthalmologist was impressed with the lack of concern that Fournier exhibited regarding the helicopter incident. Petitioner returned to work the next day and continued working through December 11, 1981, without complaints of pain to anyone, including his wife. On December 15, 1981,

petitioner made complaints of chest pain to Dr. Crenshaw, his family practitioner, but said nothing of his back, neck, or any other orthopaedic problem.

The first evidence of any orthopaedic complaints by Fournier appears in the record of his visit to his family physician on January 6, 1982, more than nine weeks after the emergency landing. At that time, Dr. Crenshaw performed an orthopaedic examination but found nothing abnormal. Subsequent visits to another general practitioner and an orthopaedist revealed no orthopaedic or neurological abnormalities.

Unhappy with this orthopaedist's findings, petitioner's attorney advised him to schedule an appointment with Dr. John Watermeier who, like the other physicians of petitioner's choosing, found no objective evidence of any abnormality during petitioner's first three visits. Despite the fact that Dr. Watermeier's own clinical evaluations failed to produce any objective evidence of an invertebral disc problem, that EMG and myelogram test results were negative, and that radiculogram results were at best "suspicious," on February 19, 1982, approximately three weeks after his first meeting with Fournier, Dr. Watermeier performed surgery. "For reasons never satisfactorily explained to the [trial court], Dr. Watermeier deemed this surgery appropriate." (Trial Court's Memorandum Opinion, p. 5.)

In January, 1983, based on similarly suspect symtoms, Dr. Watermeier performed an anterior cervical fusion. This surgery was followed by a repeat lumbar laminectomy, discectomy and fusion of petitioner's lower back in May, 1983, and a second anterior cervical fusion in May, 1985. In March, 1986, petitioner once again underwent surgery, this time a lumbar sympathectomy. This apparently uncommon procedure is not recommended by any doctors in the New Orleans area other than Dr. Watermeier and his partners.

Dr. Oliver Sanders, petitioner's treating psychiatrist, admitted that petitioner's anxiety, chronic pain syndrome and depression could be attributed to his deteriorating physical condition and extensive medical treatment.

On January 20, 22 and 23, and February 2, 3, 5, 6 and 9, 1987, a trial on the issue of damages was held before the Honorable Henry A. Mentz, Jr. of the United States District Court for the Eastern District of Louisiana pursuant to the court's admiralty jurisdiction, 28 U.S.C. § 1333. Following submission of post-trial memoranda by all parties addressing the issue of causation, the trial court found that petitioners had failed to sustain their burden of proof on causation. The United States Court of Appeals for the Fifth Circuit affirmed the trial court's opinion by way of its summary calendar on April 18, 1988, and subsequently denied petitioners' Petition for Rehearing En Banc.

SUMMARY OF ARGUMENT

These are no "special and important reasons" within the meaning of Rule 17 of the Supreme Court Rules which would require the Court to grant review on a writ of certiorari. While petitioners argue that they presented uncontradicted medical evidence that Mr. Fournier suffered disabling psychiatric injuries, it is clear that the trial court's decision was based on its finding, properly supported by the evidence, that petitioners failed to sustain their burden of proof on the issue of causation. The great weight of evidence, and that accepted by the trial court, overwhelmingly reflected that petitioner did not undergo a traumatic event. This evidence, along with petitioner's lack of credibility, supports the finding of the trial court that petitioner failed to establish the vital causative link between the helicopter emergency landing and his psychiatric problems. The same evidence establishes that the Court of Appeals properly affirmed the finding of the lower court since there was no violation of the "clearly erroneous" standard.

Further, it is apparent from a review of the rules at issue that the Fifth Circuit Court of Appeals Internal Operating Procedures do not provide a more narrow entitlement to rehearing en banc than Federal Rule of Appellate Procedure 35(a). Both standards provide for the same limited entitlement to rehearing en banc and simply complement, rather than contradict one another.

ARGUMENT

A. There Are No "Special And Important Reasons" Under Rule 17 For Review On Writ Of Certiorari Where Dismissal Of Petitioners' Claims Was Not Contrary To Established Law And Affirmance Did Not Violate The Clearly Erroneous Standard.

Petitioners seek a writ of certiorari arguing that they presented uncontradicted medical evidence that Mr. Fournier suffered disabling psychiatric injuries. Unfortunately, petitioners' argument overlooks the obvious —the trial court's dismissal was based on its finding, supported by the evidence, that petitioners failed to sustain their burden of proof on the issue of causation. There is no legal precedent of this Court or any other which suggests that a plaintiff is entitled to damages if he fails to establish a causal link between his injuries and the events sued upon. Quite to the contrary, the plaintiff bears the burden of establishing the vital link of causation between the incident and his injury. *Restatement of Torts Second* § 433B (1964); *See, Herrmann v. Nicor Marine, Inc.*, 664 F. Supp. 241 (E.D. La. 1985).

As determined by the lower courts, petitioners herein failed to carry their burden of proving by a preponderance of the evidence that the conduct of the respondents was a substantial factor in bringing about their harm. Both the work history of Fournier following the emergency landing and the testimony of petitioner's own doctor support the conclusion that Fournier's physical

injuries are unrelated to the helicopter incident. Dr. Isadore Brickman, the physician who performed petitioner's most recent operation, confirmed the testimony of Dr. Richard Levy, respondents' expert neurologist, that extensive trauma is not a prerequisite for the physical injuries sustained by Fournier.

Like petitioner's deteriorating physical condition, his psychiatric condition was attributed to the extensive medical treatment he had undergone. The trial court recognized that since his initial surgery, Fournier's mental condition along with his physical condition had seriously deteriorated. The trial testimony of Dr. Sanders, petitioner's treating psychiatrist, confirmed that petitioner's anxiety was related to his deteriorating physical condition and that his chronic pain sydrome and depression related to his orthopaedic problems and probable nerve injury.

Although Dr. Sanders attributed some anxiety and depression to the helicopter incident, this diagnosis was based entirely on the representations of the petitioner. Dr. Sanders testified that during his initial examination, he obtained a history from Fournier of a helicopter crash in bad weather into rough seas. Fournier reported to Dr. Sanders that the helicopter fell 800 feet into the water after which time he was "beaten up" for two hours in the water. Accordingly, the validity of Dr. Sanders' diagnosis, like the entirety of petitioner's case, is completely dependent on petitioner's credibility.

The sole basis for any of the evidence presented by petitioner in support of his claim of disabling injury was the word of petitioner himself. After having the opportunity to observe the witnesses present at trial and to balance the evidence presented, the trial court afforded little credence to the testimony of Fournier. Clearly, the Fifth Circuit was correct in giving great deference to the trial court's ability to evaluate the credibility of witnesses. Fed. R. Civ. P. 52(a); *Anderson v. City of Bes-*

semer City, N.C., 470 U.S. 564, 573 (1985); *Gilmore v. Waterman Steamship Corp.*, 790 F.2d 1244 (5th Cir. 1986); *McDowell v. Safeway Stores, Inc.*, 753 F.2d 716 (8th Cir. 1985). Although this Court, like the appellate court below, does not have the benefit of personal observation in assessing Mr. Fournier's credibility, the record alone evidences the many direct contradictions between petitioner's testimony and that of the other witnesses, including those who testified during petitioner's own case-in-chief.

Nowhere is petitioner's testimony more at odds with the balance of the evidence than in regard to the nature of the emergency landing and subsequent time spent awaiting rescue. Quite simply, the preponderance of the evidence does not support a finding that the emergency landing episode was of the traumatic nature that petitioner represented to Dr. Sanders and this Court. Fournier has characterized the incident as a free fall of the helicopter from an altitude of approximately 800 feet, a violent crash into the sea, and a subsequent period of two hours aboard the aircraft during which he was constantly thrown and jerked about. However, this account is drastically different from the descriptions given by his fellow passenger and the helicopter pilot. The pilot, Ellis Blinsky, testified that when the engine failed, he immediately entered autorotation, maintaining control over the aircraft, and successfully landed in the Gulf with the pontoons inflated. Mr. LeBlanc, who sat in the rear of the helicopter, confirmed that the pilot maintained control over the aircraft during the entire descent and then simply "set it down in the water." Clearly these accounts more closely comport with the evidence showing that the other two occupants of the aircraft were not injured and that the aircraft itself was not damaged on landing.

Further, neither Blinsky nor LeBlanc corroborated Fournier's testimony that the aircraft was tossed about in the seas after coming to rest on the water. While

Fournier claimed that the pilot had trouble controlling the aircraft, LeBlanc testified that he was relieved when he saw how well the pilot maintained control of the aircraft while in the water. Pilot Blinsky also described the time spent in the water as calm, with the helicopter riding the waves and no violent motion to the passengers. In contrast to the accounts of Blinsky and LeBlanc, petitioner's description portrayed the aircraft as being "beaten" by the waves, almost causing it to turn over at one point, while the occupants were thrown around inside. Again, the trial court considered the testimony of Blinsky and LeBlanc to be more plausible than that of Fournier, finding that the helicopter "rode with the waves."

Although Fournier claims that his ordeal continued after the rescue boat arrived, there is nothing in evidence, other than his own testimony, to support this contention. To the contrary, there are several indications that Fournier is again exaggerating his difficulty. Mr. LeBlanc testified that other than one occasion when Fournier went into the water, he did not recall the petitioner wheezing or coughing. Pilot Blinsky asked petitioner both while in the aircraft and on the rescue boat if he was injured and petitioner said, "no." While Fournier testified at trial that he was struck by the helicopter numerous times while in the water, Dr. J.T. Kennedy, the emergency room physician at Abbeville General Hospital reported that petitioner responded negatively when asked if he had any injuries.

Obviously, the lower courts' findings reflect an acceptance of the testimony of Blinsky and LeBlanc regarding the nature of the events which petitioner contends led to severe and disabling psychiatric injuries. It is well-settled that this Court gives great weight to findings of fact made by the district court and approved by the Court of Appeals. *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed. 2d 70 (1984).

Here, both the findings of the lower courts and the evidence in the record amply support the rejection of petitioner's questionable claims of psychiatric injury. Also dubious are petitioner's claims that the emergency landing induced a chronic fear of flying. It is difficult to reconcile this claimed fear of flying with the undisputed fact that Fournier continued to fly in helicopters for a long period of time following the incident.

Petitioners' contentions that the lower courts ignored the evidence of psychiatric injury are completely unfounded. There is absolutely *no* indication that the courts did not consider the evidence relating to petitioner's psychiatric injury, merely that they rejected petitioner's evidence based on their determination that it was not credible.

Further, petitioners' attempt to bolster their argument with the affidavit of Dr. Oliver Sanders, which was first attached to their Motion for Rehearing En Banc, is inappropriate and may not be considered by this Court. In resolving a case on appeal, reference to matters not in the record is improper and attachments to briefs do not suffice. *GHR Energy Corp. v. Crispin Company Ltd.*, 791 F.2d 1200 (5th Cir. 1986); *Rachbach v. Cogswell*, 547 F.2d 502 (10th Cir. 1976); *Rebuck v. Vogel*, 713 F.2d 484, 486 (8th Cir. 1983). Affidavits outside the record cannot be considered on appeal. *Scarborough v. Kellum*, 525 F.2d 931, 933 (5th Cir. 1976).

Despite petitioners' contentions to the contrary, the trial court's dismissal was not contrary to established law and the appellate court's affirmance was not violative of the clearly erroneous standard. Thus, there are no "special and important reasons" within the meaning of Rule 17 of the Supreme Court Rules which would require the Court to grant review on a writ of certiorari.

B. The Internal Operating Procedures Of The Fifth Circuit Court Of Appeal Do Not Set Forth A Narrower Entitlement To Rehearing En Banc Than Federal Rule Of Appellate Procedure 35(a).

Petitioners argue that the Fifth Circuit's Internal Operating Procedure provide a more limited entitlement to rehearing en banc than Federal Rule of Appellate Procedure 35(a). However, a brief review of these rules reveals that there is no such inconsistency. Fed. R. App. P. 35(a) dictates that a rehearing en banc is appropriate: "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." In conjunction with this rule, the Fifth Circuit has devised its own Internal Operating Procedure which provides that:

> A suggestion for rehearing en banc is an extraordinary procedure which is intended to bring to the attention of the entire Court a precedent setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Fifth Circuit precedent. Alleged errors in the determination of state law, or in the facts of the case (including sufficiency of the evidence), or errors asserted in the misapplication of correct precedent to the facts of the case, are matters for panel rehearing but not for rehearing en banc.

When both are viewed in their entirety, there is simply no inconsistency and thus, the Fifth Circuit has not violated its rulemaking authority.

Both the general appellate rules and the Fifth Circuit's local rules recognize that a rehearing is not favored and should be ordered only in exceptional circumstances. Fed. R. App. P. 35(a); Local Rules of Fifth Circuit 35.1. In fact, the Fifth Circuit notes that "[s]uggestions for rehearing en banc are the most abused prerogative of appellate advocates in the Fifth Circuit."

Through its Internal Operating Procedures, the Fifth Circuit has merely devised its own administrative machinery through which to exercise its en banc power. *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247, 97 L.Ed. 986, 73 S.Ct. 656 (1953). Clearly, this rule is a proper exercise of the wide discretion allotted to the Circuit courts in establishing procedures that promote sparing use of en banc power.

CONCLUSION

There are simply no compelling reasons for this Court to grant review on the writ of certiorari in this case. Petitioners simply failed to establish a causal link between alleged injuries and the events sued upon. Further, the Fifth Circuit has adopted appropriate procedures for adjudging a party's entitlement to rehearing en banc and its procedures do not conflict with Federal Rule of Appellate Procedure 35(a). Accordingly, the writ of certiorari should be denied.

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Supreme Court, U.S.
FILED
SEP 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-363

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

DANIEL FOURNIER AND BARBARA FOURNIER,
Petitioners

v.

PETROLEUM HELICOPTERS, INC., *et al.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Whether the Petition, which consists of nothing more than a complaint about findings of fact of the Trial Court, presents any "special and important reasons" in accordance with Rule 17 of the Supreme Court Rules which governs review of decisions of federal courts of appeals.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Sundstrand, Allison, and Airwork disagree with the Statement of the Case of Petitioners, and specifically adopt the Statement of the Case of Petroleum Helicopters, Inc. which is contained in the Brief in Opposition to Petition for Writ of Certiorari filed by Petroleum Helicopters, Inc. herein.

The very fact that there are disagreements between the parties as to the facts shows that this case does not meet any of the Rule 17 considerations which govern review on certiorari.

As revealed by the opposition brief of Petroleum Helicopters, Inc., the petition in this case is nothing more than a complaint over properly reached findings of fact by the Trial Court. In accordance with Federal Rule of Civil Procedure 52(a), the United States Court of Appeals for the Fifth Circuit held that the findings of fact, based upon oral and documentary evidence, were not clearly erroneous, and the decision of the Trial Court was affirmed.

Because the petitioners only complain about factual findings, the petitioners cannot meet any of the considerations governing review on certiorari which are set forth in Rule 17 and its interpretive jurisprudence and, therefore, the petition for Writ of Certiorari should be denied.

ARGUMENT

In a nutshell, petitioners claim that they are entitled to certiorari because the Trial Court rejected claims of physical and/or psychiatric injuries. As shown in Appendix A of petitioners' brief, a three judge panel of the United States Court of Appeals for the Fifth Circuit specifically reviewed the Trial Court's findings of fact. The Court of Appeals said:

> "We review the district court's findings of fact under the 'clearly erroneous' standard. Fed.R.Civ.P. 52(a). Plaintiffs contend that the court improperly found that the emergency landing was not a crash and that Fournier was not subject to a particularly traumatic experience. The court's findings, however, are supported by the testimony of Blinsky and LeBlanc and by Fournier's own admission to Blinsky and Dr. Kennedy that he was not injured. . . . *We find ample evidence in the record to support the court's factual findings and its conclusion that plaintiffs failed to establish causation, and therefore hold that plaintiffs' challenges to these findings is without merit.*" (Brief of petitioners at A-6). (Emphasis added).

Rule 17 stating "considerations governing review on certiorari" specifically provides:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor."

Rule 17 goes on to spell out three non-exclusive factors for the exercise of the discretion of the Supreme Court, but none of the non-exclusive factors can be stretched to include a simple review of findings of fact by a Trial Court. Indeed, interpretive decisions as well as commentary on Rule 17 have made it clear that the Supreme Court does not grant certiorari to review decisions that turned upon an analysis of facts. In *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178-179, 58 S.Ct. 849, 82 L.Ed. 1273 (1938), the Supreme Court said:

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." (304 U.S. at 178).

Moreover, in *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503, 71 S.Ct. 453, 95 L.Ed. 479 (1951), the Court said:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. *It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony* whereon a conscientious consideration of the entire record, a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations, we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." (340 U.S. at 503). (Emphasis added).

In summarizing the above interpertive jurisprudence of Rule 17, commentators have said:

> "Ordinarily, the Supreme Court will not grant certiorari merely to review evidence or inferences drawn therefrom." 2 *Fed. Proc.* L.Ed. § 3:210 (1981).
>
> * * * *
>
> "An issue of fact is not 'important' for purposes of R.17. Normally, the Court will not grant certiorari to review a decision that turns solely upon an analysis of facts, or to determine whether evidence supports a judgment of district court. . . . As to such issues, the courts of appeal are generally the courts of last resort. . . ." 13 *Moore's Fed. Prac.* 2d Ed., § 817.41 (1988).

The Petition for Writ of Certiorari is based upon nothing more than a complaint as to the findings of fact of the trial court which were affirmed by the Court of Appeals for the Fifth Circuit. As the Brief in Opposition to the Petition for Writ of Certiorari of Petroleum Helicopters, Inc. shows, the trial court and the Court of Appeals for the Fifth Circuit specifically rejected the interpretation of the evidence of petitioners. Inasmuch as petitioners want nothing more than a review of a decision that turns solely upon an analysis of facts, the Petition for Writ of Certiorari should be denied.

CONCLUSION

Sundstrand, Allison, and Airwork join in the Opposition of Petroleum Helicopters, Inc. to the Petition for Writ of Certiorari. The Petition for Writ of Certiorari itself shows that petitioners complain of nothing more than findings of fact.

The findings of fact that are complained about were the result of careful consideration by the Trial Judge, and the findings of fact were subjected to a comprehen-

sive review by the Court of Appeals for the Fifth Circuit which affirmed the Trial Judge's opinion. The Petition for Writ of Certiorari is nothing more than further complaint about factual findings that are amply supported by the record as demonstrated by the United States Court of Appeals for the Fifth Circuit opinion, which is made a part of the Petition for Writ of Certiorari.

Sundstrand, Allison, and Airwork respectfully submit that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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